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ONTARIO LAW REFORM

COMMISSION

REPORT NO.1

[Toronto, 1966]

Ontario Law Reform Commission
Report No. 1

TO THE HONOURABLE A. A. WISHART, Q.C., ATTORNEY-GENERAL FOR ONTARIO

Dear Mr. Attorney:

Your Commission appointed pursuant to the provisions of The Ontario Law Reform Commission Act, 1964, 12-13 Eliz. II, c. 78, begs leave to submit the following report recommending legislation to amend the law relating to perpetuities and accumulations.

Your Commission believed that the rule against perpetuities was an urgent subject for study and recommendations, with a view to law reform. From its origins in the early part of the seventeenth century this judge-made rule has served a useful social function but in the long course of development has acquired unsatisfactory attributes which can now be removed only by legislation. Reform of the rule is long overdue. As has been said, "it is scarcely credible that in the second half of the twentieth century testamentary dispositions offering no threat to the public interest, and reasonable bargains between business men dealing with each other at arm's length, should continue to be struck down in the name of public policy," yet this is frequently the result of the application of the rule in its present form.

The last fifteen years have produced a rising tide of research and legal writing, critical of the operation of some aspects of the rule. Statutory reform has followed in Great Britain, Western Australia and in many states of the United States. The impetus for most of the literature is directly attributable to the work of Professor W. Barton Leach, Story Professor of Law, Harvard Law School, and Dr. J. H. C. Morris, Fellow of Magdalen College, Oxford, and in this

jurisdiction to the teaching and writing of Dr. C. A. Wright, Q.C., Dean, Faculty of Law, University of Toronto. On the two former we have relied heavily for their written contributions: Morris and Leach, The Rule Against Perpetuities, 2nd ed., 1962; Morris and Wade, Perpetuities Reform at Last (1964), 80 L.Q.R. 486; Leach: Perpetuities: Staying the Slaughter of the Innocents (1952), 68 L.Q.R. 35; Perpetuities in Perspective: Ending the Rule's Reign of Terror (1952), 65 Harv. L. Rev. 721; Options to Purchase and The Rule against Perpetuities, 18 The Conveyancer and Property Lawyer (Nov.-Dec. 1954); Perpetuities Reform by Legislation (1954), 70 L.Q.R. 478; Perpetuities Legislation, Massachusetts Style (1954), 67 Harv. L. Rev. 1349; Perpetuities Reform by Legislation: England (1957), 70 Harv. L. Rev. 1411; Perpetuities: New Absurdity, Judicial and Statutory Correctives (1960), 73 Harv. L. Rev. 1318; Perpetuities Legislation; Hail, Pennsylvania! (1960), 108 U. of Pa. L. Rev. 1124.

On Dr. C. A. Wright, your Commissioners have depended for the bulk of the research and the critical analysis which have led to the preparation of this report and the drafting of the proposed amending legislation. We are happy to acknowledge his pre-eminence in the field and are eager to express our sincere gratitude to him.

In July, 1964 the United Kingdom enacted The Perpetuities and Accumulations Act, 1964, being 1964 (U.K.), c. 55 which adopted the majority of the recommendations of the English Law Reform Committee in its report of October, 1956 (Cmd. 18). Western Australia in 1962 had enacted its statute also based on the English Law Reform Committee's report.

In light of this activity which is available to any reader, this report will deal with: (I) the need for reform of the existing law; (II) actual proposals for reform which are deemed to be advisable in Ontario; and (III) methods by which those proposals can be carried into effect.

I

The Need for Reform of The Rule Against Perpetuities

(a) Should the Rule be Abolished?

There is no doubt that the origins of the rule against perpetuities lie in the attempt of the courts to frustrate conveyancers' efforts to create the equivalent of unbarrable entails by reason of the use of executory limitations. This arose when most wills and conveyances of land were dealing with specific pieces of property. Today when the use of the trust has superseded this method of settlement, it is more difficult to find a satisfying rationale for the rule against perpetuities.

There can be no doubt that although the rule was concerned with remoteness of vesting, it had in origin some relation to alienability problems, particularly from the point of view of "practical alienability", since with remote uncertain events likely to terminate a given interest of land, it was almost impossible for the present holder and the person or persons who might be entitled on the remote condition to agree upon a price for the property. Similarly, the rule did have some application to realizing the full potential of property since a curb on the full use of property would undoubtedly lie in the possibility of that property being lost by the happening of some remote contingency. Neither of these rules is applicable to trusts where the trustee is given power to change

investments, and yet the rule has been applied to them as, indeed, we shall see in another connection it has been applied with even less reason to certain commercial transactions such as options.

Despite the fact that it is becoming increasingly difficult to find a completely satisfactory rationale for the existence of the rule, there is a general acceptance that we need something like the rule against perpetuities, if for no other reason than that it strikes a balance between the desires of one generation and those of succeeding generations to do what they wish with property. In other words, the extent to which the deed can control or limit the use of property prevents future generations from exercising a similar control, and the rule against perpetuities works out a compromise by striking down limitations after a remote period.

Despite the difficulties of setting out in detail, beyond the factors we have mentioned, the rationale for the rule, it is interesting to note that even in England where, under modern statutes like The Settled Land Act, 1925, and The Law of Property Act, 1925, there is always some person who can sell the land regardless of the future limitations which may have been created, the English Law Reform Committee commenced their report by saying that they took it "to be beyond argument" that there was a necessity for placing some limit on the vesting of future interests. This is a view which is almost universally adopted in common law jurisdictions (with the possible exception of the State of Wisconsin) and perhaps the most down to earth view, regardless of other possible reasons, is that given by Leach in criticizing the Wisconsin view in (1960), 108 U. of Pa. L. Rev. at p. 1141, when he said "our present estate and

inheritance tax system depends on the wealth of the community going through the wringer every so often, and in the main it depends on the rule against perpetuities and its relatives to prevent the intervals from being too long." One thing is clear. Nowhere is there any considerable body of opinion that would wish to repeal the rule entirely, and accordingly, we can see no reason for recommending its abolition. Indeed, there seems to be general satisfaction with the rule apart from the manner in which it applies and apart from a few instances in which for obvious reasons it should not apply. With these, we will deal later.

(b) The Period of the Rule

While objections can be made to the "life or lives in being, plus twenty-one years" as being outmoded and based on a somewhat feudal notion of property, there is again no general dissatisfaction with the rule as such and, as the English Law Reform Committee pointed out "it is the period during which parents may have a family and the children attain full age".

There is no question that by a judicious selection of lives a competent draftsman can extend the period to close to one hundred years, but we see no reason to alter this situation. What is important, as will appear later, is the need to save provisions in wills from the inadvertent errors of draftsmen which frustrate provisions which from many points of view are both reasonable and sound. We would agree with the English Law Reform Committee that in the absence of any compelling reasons the period should remain as it always has been.

The English Law Reform Committee recommended, and the 1964 Act subsequently enacted, the provision that instead of any other particular period of duration of the perpetuity period an instrument could specify a number of

years not to exceed eighty as the period in question. The reason for this was the expressed hope that draftsmen would be weaned away from the use of the "royal lives" clause (see Re Villar, [1929] 1 Ch. 243, and Re Leverhulme, [1943] 2 All E.R. 274). As the courts have already indicated in these cases the view that they might not necessarily support royal lives clauses as they have existed in England because of the difficulty of ascertaining the lives concerned, and as we do not feel the problem to be particularly pressing in this country, we do not recommend the adoption of the English provision.

While it is true that a draftsman can extend the period to roughly one hundred years by a proper choice of lives, we do not think that the average testator has this problem in mind in drafting a will and we see no reason to encourage artificial prolongation of a period by expressing in simple terms of eighty years a period which would otherwise be ignored as relevant to the actual facts involved in a family plan. If the proper lives are chosen, we feel that the existing period should remain as it is. While this report is designed to make drafting simpler and protect, so far as possible, the intentions of testators, it is in the main directed to the attention of the average testator and the average draftsman. The testator and draftsman who wish to get an extraordinarily long period by artificial means should, in our opinion, still be left to the existing law and the law should not be made simpler on their behalf. It is only the exotic scheme which would use a royal lives provision and we see no reason to assist the exotic by legislation. Further, it is, in our opinion, wise to add as few innovations as possible to a branch of the law which has existed for as long as the rule against perpetuities, provided the main objectives of that law are clarified.

(c) The Required Certainty of Vesting; Possibilities v. Actual Events

The chief criticism of the operation of the present rule against perpetuities undoubtedly centres on the requirement of the rule that in order to be valid, it must be possible to say with absolute certainty, at the time of the creation of the interest, that the interest must vest within the perpetuity period. The corollary of this is that provided there is any possibility, however fantastic or improbable, that might conceivably prevent the vesting within the period, the limitation is void.

Illustrations of this principle are legion. For example, T bequeaths property by will on trust for the first son of A to attain 25. If A is living at T's death and none of his sons has yet attained 25, the gift is void, even though one son has then attained 24 and, in reality, attains 25 one year after T's death. (Abbiss v. Burney (1881), 17 Ch.D. 211). The reasons are that the living son might die under 25, and the first son to attain 25 might therefore be born after T's death and might attain 25 more than 21 years from the death of A.

So, likewise, in Ward v. Van der Loeff, [1924] A.C. 863, T gave property by will on trust to his wife for life and then to such of the children of his brothers and sisters as should attain 21. At T's death his father and mother were aged 66. T had two brothers and two sisters (of whom the youngest was aged 32) and seven or eight nephews and nieces (of which the eldest was aged 14). The House of Lords held that as there was a possibility that T's father and mother could have further children after his death, it was possible that the gift to his nephews and nieces might not vest until twenty-one years after the death of a child unborn at T's death. The following statement of Lord Blanesburgh in Ward v. Van der Loeff, op. cit., at 679, sums up the most cogent criticism of the rule as it presently operates:

"The existence of the rule in these days is usually made manifest only in cases where nothing of the kind having been desired or suspected, and where by nothing short of a miracle could a perpetuity at any time have supervened, even that possibility has, by the time of the contest, ceased to be existent. All the same, in these cases the rule is fatal even to gifts so innocuous, and I cannot doubt that such a result is both mischievous and unfortunate, in many directions— in this notably, that it brings a sound principle into entirely gratuitous discredit."

Since Jee v. Audley (1787), 1 Cox 324, it has been the accepted rule that a Court will consider that women aged eighty are capable of having children and by the weight of authority will receive no evidence to the contrary. (Leach calls this the "Fertile Octogenarian" rule.) This is a possibility sufficient to frustrate a well-intentioned gift of a reasonable testator —as it did in Ward v. Van der Loeff— and by itself is sufficient reason for some reform of the existing rule.

Other well-known instances of fantastic possibilities which have frustrated a testator's intention for reasons which no one has ever been able to support in logic or policy are what Professor Leach calls the case of "The Unborn Widow" and the "Magic Gravel Pits". The former refers to the situation where many testators leave property to a child who is then married, followed by a provision for any spouse who may survive such child for his or her life and then for the children of such child who are living on the death of such spouse. The gift to the children has been held invalid as infringing the rule against perpetuities on the ground that although the child of T was married when the will was made, there was a possibility that he might marry a second time, and there was a further possibility that this second

wife might be a person unborn at T's death who might outlive her husband by more than twenty-one years and hence a gift contingent on the children surviving such person would be too remote. The fact that the child's spouse predeceased him or predeceased the testator, and the child never in fact remarried, was immaterial for the purpose of saving the gift. See the cases collected in Morris and Leach, 2nd ed., p. 72.

The "Magic Gravel Pits" case centred around the notorious judgment of Re Wood, [1894] 2 Ch. 310, in which T owned gravel pits which at the time of his death would have been exhausted in four years if they had been worked at the rate which was normal with T. By his will, T devised the gravel pits in trust to be worked until the pits were exhausted and then to sell and divide the proceeds amongst his issue then living. The pits were actually exhausted in six years after T's death but the gift to the issue was held bad on the ground that on T's death there was a possibility they might not have been exhausted within twenty-one years! Other illustrations, such as provision for distribution on such events as "when my debts are paid" or "my will is proved", etc., are all snares for the unwary testator or his draftsman in the sense that they all involve a fantastic possibility that such event may not occur within the perpetuity period.

It is, of course, possible to legislate so as to remove the "fantastic" possibilities from the operation of the rule or, to go further, and legislate against those more common instances of invalidity which might trap the unwary testator, such as providing against the rule operating in cases where a testator makes gifts on the attainment of ages in excess of twenty-one, which are fraught with peril from the standpoint of the existing rule. Indeed, in 1925, England, in its Law of Property Act of that year, by s. 163 did provide that where any gift would have been void for

remoteness because it depended on a beneficiary attaining an age in excess of twenty-one years, the limitation should take effect as if the age in question had been twenty-one rather than the actual age used by the donor. A similar provision has been enacted in British Columbia. See R.S.B.C. 1960, c. 213, s. 2(36)(b).

This, of course, reaches a mechanical operation in every case and in many instances a testator's choice of a later age would seem sound and if possible should be supported. Any legislation such as the 1925 Act dealing with specific instances--or, for example, an instance abolishing the rule forbidding the reception of evidence as to lack of child-bearing capacity--while an undoubted improvement over the existing situation--is really only a treatment of symptoms and ignores the actual disease affecting the present rule's operation.

If the rule against perpetuities is a rule designed to prevent instances from arising beyond the perpetuity period, there would seem to be no reason for dealing with possibilities of such an interest arising. As Waterbury, Some Further Thoughts on Perpetuities Reform (1957), 42 Minn. L. R. 41 at 47, says: "A possibilities test is not silly because it turns on silly possibilities. It is silly because it turns on possibilities in the first place--when the evil aimed at is the actual event."

While many people insist that it should be possible to determine once and for all, at the time an instrument becomes effective, whether the contingent interests created are valid or not, it is much more difficult to find any substantial reason for such dogmatic statements. Even the English Law Reform Committee keeps referring to the desirability of determining the validity at an early stage but no reasons are given to show why this is desirable or necessary. The only people who have a real pecuniary interest in determining the validity at an early period are persons whom the testator has expressly excluded from his bounty, and there would seem to

be no reason in their favour for an early determination of the issue. In all the literature, there seems to be no serious argument in favour of confining the issue of validity to the date of creation of the interest, and once this central pillar of the present rule's existence is removed, the way for basic reform is fairly simple.

This basic reform has, through long American, and more recent English practice, become known as the "wait and see" doctrine. Shortly stated, this means that the test for validity or otherwise of a limitation should not depend on a decision on the death of a testator based on facts that might happen, but deals rather with events that have actually happened at that time, or may actually take place in the future, provided those events occur within the perpetuity period. Thus, for example, whereas a gift by will to the children of A, a living person at T's death, when such children attain the age of twenty-five, would be invalid, suppose that in actual fact A died ten years after T, leaving three children, the eldest of whom was twenty-one and the youngest five. It is now obvious on the actual facts that occurred that all the children of A, if they attain a vested interest at all, must do so well within the period of twenty-one years after the life of their parent who was a life in being on T's death. This does not involve any tampering with the age limit imposed by T, which may very well be sound in light of what he knows about his son's family.

In 1947 Pennsylvania passed a statute (see Morris and Leach, 2nd ed., p. 331, and see Leach, Perpetuity Legislation: Hail Pennsylvania!, supra) which validated any interests which had actually vested within the perpetuity period "as measured by actual rather than possible events". The principle of this legislation has marked the basis for most of the statutory reform since then in the United States and it has, with some variations as to detail, received the support of the Law Reform Committee in England and has been, again with variations, introduced into the

English Act of 1964. It has also been accepted in the Western Australian legislation based on the English Law Reform Committee's report.

While the "wait and see" principle does involve a basic and fundamental change in the application of the perpetuity rule we consider that its adoption is essential to any sound approach to reforming the law concerning perpetuities. While the adoption of "wait and see" is a fundamental change, it is important to note that, even now, in connection with appointments made under special powers of appointment, the courts will take a "second look" at the facts existing at the date of the appointment and will not confine themselves to the facts existing at the time the power was created, even though the perpetuity period is measured from this date. (See Morris and Leach, 2nd ed., pp. 152-54.) This in effect is an application evolved by the courts of "wait and see" in a special case. The same can be said of determining the validity of gifts in default of appointment (see Morris and Leach, 2nd ed., pp. 159-63), and to cases where a gift is made on one of two express contingencies, one of which may not and the other must occur within the perpetuity period (see Morris and Leach, 2nd ed., p. 181).

While the "wait and see" doctrine would undoubtedly avoid the necessity of testing the validity of a limitation by fantastic possibilities, and while it would go far to validate many limitations which are today a snare for the unwary testator or draftsman, it is doubtful whether standing alone it would achieve all of the reforms which are desirable in the present application of the rule. For example, we believe that reform in what is basically a rule of evidence concerning the possibility of having children is long overdue. That women of ninety should continue to be presumed to be capable of having children is contrary to all medical knowledge. We feel that in this connection even though a "wait and see" principle were adopted, it

should be possible to inquire at any given moment of time whether children are likely to be born or not. To that limited extent we recognize that there is some reason for knowing as soon as possible whether a limitation is valid or not and if this depends on a fact which can be proved by evidence, such as the inability to bear children, specific reforms to this effect would be helpful. Indeed, following the recommendations of the English Law Reform Committee, we feel that a provision to this effect might well be placed in the Trustee Act as well, in order to settle the question of termination of trusts and other dispositions of property where the issue of having further children should be decided on facts rather than artificial rules having no basis in probabilities.

(d) Reforming the Instrument Apart from "Wait and See": Cy-pres.

Even assuming the law to be reformed by the adoption of a "wait and see" principle, there may be cases where a limitation would be invalid as drawn and yet there may be reasons for doubting the soundness of the consequences which follow from such invalidity. It must be borne in mind that when a limitation in a testator's will is declared invalid, it is not the testator or his draftsman who suffer any dire consequences. What occurs is that people the testator did not want to have the property in question actually receive it and persons whom he wished to have the property do not obtain it. Inasmuch as the rule against perpetuities is highly technical, and conceding a basic freedom of testation in our law, it can and has been argued that our law should be flexible enough to reform the testator's will — or other dispositive instrument — so as to accord with what his probable intentions would have been had he known of the actual invalidity. One thing is certain; no testator ever inserts a provision in his will on the understanding that it will be void. He usually dies expecting the provisions he has made to be carried out, and even though those actual

provisions may violate the principle of remoteness of vesting, the question arises whether some other method should not be adopted to administer the void limitations cy-pres, as is done, for example, in connection with charitable gifts which prove impossible of being carried out in the exact manner contemplated by the testator.

Certainly s. 163 of the English Law of Property Act, 1925, provided for an automatic reform of a testator's will, where a testator had inserted the attaining of a given age over twenty-one and this would result in invalidity on the grounds of perpetuity. The legislation automatically substituted in such cases the age of twenty-one. Apart from the fact that this gave no effect to the "wait and see" doctrine, it still seems a rather serious interference with a testator's intentions if those intentions could be more closely approximated by some reform of the will.

For example, suppose a testator made a gift to such of the children of A as shall attain the age of thirty. A is alive on T's death but dies ten years later, leaving two children, aged eight and six respectively. Obviously, this gift is not saved by the application of "wait and see" since it would require twenty-two years after the life in being for the eldest child and twenty-four years for the youngest child to participate. It is possible to apply automatically a statute like s. 163 of the English 1925 Act which would reduce the age from thirty to twenty-one, in which case both of A's children on attaining that age would take. As the testator had some reason for extending the age to thirty, why is it not possible to work out some other rule by keeping the limitation so that a more advanced age than twenty-one might be reached? On the actual facts which have occurred, A's two children within twenty-one years of their father's death (the perpetuity period) could have attained the age of twenty-seven, and it seems sensible to us to reform the will by substituting that age in place of the age of thirty, provided this can be worked

out without too much elaboration in the statute, and without too much difficulty on the part of practitioners and courts.

Perhaps the simplest method of dealing with the question of cy-pres is that adopted by Vermont in 1957 which reads as follows:

> "Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest, the period of perpetuity shall be measured by actual rather than possible events."

Such a statute has the merit of shortness and, in the opinion of some persons, e.g., Professor Leach, it is the desirable answer to our present problem. A Canadian commentator goes even further and suggests that courts have a complete power of reforming the instrument, including the power of declaring remote interests valid wherever this would not create "visible inconvenience" (Lang, The Perpetuities Act for Saskatchewan (1962), 40 Can. Bar Rev. 294). This goes far beyond the American statutes, all of which confine the reforming power to be exercised "within the limits" of the perpetuity rule. The Vermont statute, along with the Pennsylvania statute, has been the subject of some criticism in the United States but the criticism has been largely from the direction of determining what are the possible lives to be used in ascertaining the invalidity of a gift when no specific period for determining that invalidity has been spelled out.

To meet this specific objection, Kentucky enacted a somewhat similar Act in 1960 (see Morris and Leach, 2nd ed., p. 332) which reads as follows:

"2. In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest."

The problem of determining lives will be considered in the next main section when specific recommendations for legislation in this province are made.

The broader question of reforming the limitation entirely at a court's discretion, is one which theoretically appeals to us, but which we do not feel would be welcomed by the profession or by the bench. What we feel to be required, and accordingly recommend, is reform within limits, after the "wait and see" principle has been applied. Those limits must be spelled out with some particularity both for the guidance of the profession and the court which is faced with the necessity of re-making a will. For one thing, if the limits for reform are known, the expense of actual application to a court may be reduced or eliminated — a serious consideration in these cases. It is in light of that principle that we feel a provision like s. 163 of the English Law of Property Act should be adopted with the modifications referred to, as well as certain other provisions. For example, one of the objections to the existing rule against perpetuities is its operation in connection with class gifts.

(e) Class Gifts

The leading case on the application of the rule against perpetuities to

class gifts is undoubtedly Leake v. Robinson (1817) 2 Mer. 363, which lays down the rule, consistently followed since then, that a limitation to a class is really "all or nothing", so far as perpetuities is concerned, in the sense that all members of the class must be ascertained within the perpetuity period and the maximum, as well as the minimum, size of each member's share must also be determined within the perpetuity period, otherwise the interests of all members are struck down. In other words, there is no such thing as partial validity of a class gift in the sense that two members of a class might be ascertained within the period, whose gifts might conceivably be treated as valid, while the share of others, who infringe the rule, fail. If any possible member of a class could take a share beyond the period, then this affects the gifts to those persons of the class who satisfy the conditions within the perpetuity period. This rule has been subject to serious attack by Professor Leach for some years (Leach, The Rule Against Perpetuities and Gifts to Classes (1938), 51 Harv. L.R. 1329).

The English Law Reform Committee recommended that a class gift should not be invalidated by the failure of the limitation to some only of the members of a class and that the limitation should be construed to take effect as a limitation only to those members of the class who comply with the perpetuity rule. In thus striking out possible objects of the testator's bounty this recommendation, somewhat similar to s. 163 of the English Law of Property Act, 1925, is a method of reforming the instrument to accord with the probable intentions of the donor, who undoubtedly would have preferred part of the class to take, in the event that it was impossible to give full effect to his complete intention with respect to the class as a whole.

We agree with the recommendation of the English Law Reform Committee and believe that there should be power of separating the good from the bad in connection

with a class gift, as a way of salvaging the testator's intention. Many of the class gifts would, of course, be saved by the application of "wait and see", and it should be only after the "wait and see" rule fails to produce the completely valid limitation that the drastic provisions of lopping off part of a limitation should be given effect.

In similar vein, we believe that the adoption of something like s. 163 of the English Law of Property Act, 1925, should follow after the application of "wait and see". There was a difference of opinion in the English Law Reform Committee on this matter. The majority took the view that s. 163 should have an automatic application before "wait and see" was applied. The minority did not agree with this and the minority view has apparently prevailed in the 1964 Act. We are in agreement with the minority view and believe that, granted the fundamental change of "wait and see" and the determination of validity or invalidity by actual events, interference with the testator's intention, either by way of something similar to s. 163 or the new class gift rule should follow after the application of that main principle in every case.

(f) Unborn Spouses

Reference has been made above to the inadvertent references by a testator to the spouse of a living person and the resulting invalidity by reason of the possibility of such spouse being a person unborn at the time of the creation of the limitation. This is such a common mistake and one that is so easily made that suggestions have been made for legislative change to cover the specific situation.

Granted the adoption of the "wait and see" principle, it is obvious that the vast majority of cases would be covered by that doctrine, since it must be in only a small percentage of the cases that the spouse referred to would actually be

a person not in being. Notwithstanding this, we agree with the English Law Reform Committee that the case is worthy of specific mention in any legislative reform although we do not agree either with the English Law Reform Committee's recommendation or with the somewhat different provision in the 1964 Act covering the case.

We believe this case to be so exceptional as to warrant a complete departure from the existing perpetuity rule in those cases where the "wait and see" doctrine does not save the gift. It seems to us much simpler to provide that where the gift has not been saved by that principle, the spouse referred to shall be deemed to be a life in being, even though such spouse was not actually born until after the commencement of the perpetuity period. We believe this to accord with the testator's intention and to involve no particular inconvenience by a limited extension of the perpetuity period. As already indicated, it would apply in only a very small percentage of cases after the adoption of the "wait and see" principle. The proposed legislative change has been adopted by Western Australia in their Perpetuities Bill of 1962 (see Morris and Leach, 2nd ed., p. 339).

(g) Dependency

The point with respect to this problem is so succinctly stated in the English Law Reform Committee's report that we quote it in full:

> "32. There is, however, one change which can, we think, be made with relative ease. At present, a limitation which itself complies with the rule (perhaps because it is vested *ab initio*) is nevertheless invalid if it is subsequent to and 'dependent upon' a void limitation. If the ulterior limitation is 'dependent upon' the prior invalid limitation in the sense that it is itself contingent upon the same contingency as strikes down the

prior limitation, then plainly it must be held invalid for the same reason. But the phrase 'dependent upon' does not appear to be confined to such cases, and it is not easy to discover any precise test for 'dependency' in this context. On this point, it may without any disrespect to the courts be said that a perusal of cases such as Re Thatcher's Trusts (1859), 26 Beav. 365, Re Backhouse, [1921] 2 Ch. 51, Re Canning's Will Trusts, [1936] Ch. 309, Re Coleman, [1936] Ch. 528, and Re Mill's Declaration of Trust, [1950] 1 All E.R. 789 (affirmed [1950] 2 All E.R. 292) is more depressing than illuminating; and we can see small merit in attempting to make more precise a doctrine in which we can discern little virtue."

The same criticism was made with a fuller reference to the case law in Morris and Leach, 2nd ed., ll. 173-181. We agree that in view of the lack of preciseness in the phrase "dependent on" and other like phrases, no interest which by itself is valid should be struck down by the rule against perpetuities simply because of the failure of the earlier interest. In order to clear up any possible obscurities in the case law we also believe that it should be expressly stated that on the invalidation of an earlier interest the remaining interest which is independently valid should be accelerated. This provision has been adopted in the 1946 English Act (s. 6) and has been adopted in the Western Australia Act of 1962, s. 13 (Morris and Leach, p. 339).

(h) Power of Appointment

(i) Validity of the Power

Under existing law a general power is struck down by the rule against perpetuities if it may become exercisable after the perpetuity period has elapsed.

For example, the donee may not be ascertainable within the perpetuity period or a power may be given to a survivor of a class of unborn persons.

Consistently with the "wait and see" principle, we believe that the validity of general powers should not depend on the possibility of the power not being exercisable at a remote period but should only be invalidated if events prove that it cannot be exercised within that period.

Similarly, a special power of appointment is void if it might be exercised beyond the perpetuity period. (See Morris and Leach, 2nd ed., 1. 141.) Again, consistently with the principle of "wait and see" we believe that a special power should not be treated as void until the facts show that it was not exercised within the perpetuity period.

The English Act carried out the provisions of "wait and see" recommended by their Law Reform Committee and adopted both of these principles (see sections 3(2) and (3)). We believe this to follow from the adoption of "wait and see".

(ii) <u>Classification and Division of Powers for the Purpose of the Rule</u>

With regard to special powers of appointment, it is well established that the perpetuity period starts from the date when the power was created and not from the date when it was exercised. In other words, the appointment is "read back" into the instrument creating the power as if the donee were filling in blanks in the donor's instrument. In the case of a general power to appoint, the courts consider the donee of the power to be practically in the position of the owner of the property itself. As a consequence, an appointment made under a general power is treated as though it was a disposition of the donee's own property and the perpetuity period begins to run from the date of appointment, not the date of the creation

of the power. On both these points the law is well settled (see Morris and Leach, pp. 146 and 149).

There has been considerable discussion in recent years on the question of "hybrid" powers which are difficult to classify. For example, what of a power to appoint to any person other than the donee of a power? (See Re Park, [1932] 1 Ch. 580.) Or a power to appoint only with the consent of some other person? Or a power which is exercisable by two or more persons? Or a power to appoint to any person except certain named individuals? Or, for that matter, what of a general testamentary power itself?

It is obvious that some of these powers might be treated as general for some particular purposes which do not affect the issue of perpetuities. For example, under the Wills Act certain powers might fall within the general power provisions as being exercisable by residuary gift dispositions which would not necessarily be deemed general powers for the purpose of the rule. Nor, obviously, is a classification of powers for taxation purposes necessarily relevant to the perpetuities question.

The answer to the classification of many of these instances is uncertain in the case law (see Morris and Leach, pp. 135-138), and the problem was considered in detail by the English Law Reform Committee. We agree with the view expressed by the Committee that it is unsatisfactory to leave a large portion of the law known to be uncertain to be resolved at the expense of litigants and, if possible, some specific classification should be made to avoid litigation in the future. The fact that any solution reached for the purpose of the rule against perpetuities might not be acceptable for other purposes does not seem to be a valid objection.

We believe it would be sound to commence from the reasons underlying

the general distinction made concerning types of powers from the point of view of the perpetuity rule. In other words, the power should be deemed to be a general power, in the sense that it is akin to ownership, only if the donee of the power could without the concurrence of any other person appoint to himself. Having made this distinction, it is then fairly simple to classify all other powers as special for the purpose of the rule against perpetuities. We think this classification has great merit.

This particular recommendation does not, of necessity, cover the case of a general power exercisable by will alone. In that case the donee of the power is, in one sense, unfettered as to his choice of object, but in another, and more vital, sense, he is not able to appoint to himself. Further, the property is withdrawn from ordinary commerce during the donee's life and is subject to fetters which would not apply if the donee of the power were to be treated as the owner of the property. On this view, for purely logical reasons, a general power to appoint by will should be deemed for the purpose of the rule against perpetuities to be a special power and its validity determined in the same way that the validity of a special power is determined, and appointments made under the power should be determined in the same way that appointments under a special power are considered, namely, as being read back into the donor's will and considered as of the time of the creation of the power and not its exercise.

Peculiarly enough, the existing law is split on this point. In determining whether the power itself is valid, as distinct from determining the validity of any appointments made under the power, it is settled that a power of appointment exercisable only by will is a special power (Woollaston v. King (1868), L.R. 8 Eq. 165; Morgan v. Gronow (1873), L.R. 16 Eq. 1, and Morris and Leach,

2nd ed., p. 141.)

For the purpose of determining whether an appointment under such a power infringes the rule against perpetuities, it has been held in England and Ireland that the power is general, although originally there was authority in the other direction (see the cases in Morris and Leach, 2nd ed., p. 147, and particularly Rous v. Jackson (1885), 29 Ch. D. 521). In the United States it seems to be equally well-settled that general testamentary powers are considered to be special powers in the sense that the perpetuity period runs from the creation of the power and not from its exercise. From the point of view of theory it would seem that the American view was preferable. The authors of Morris and Leach express their opinion in its favour, as, indeed, does the English Law Reform Committee. It is doubtful, however, whether a mere matter of theory should be allowed to offset what has come to be a generally accepted practice with regard to general testamentary powers, even though that practice leads to the inconsistency noted, of a difference in their classification for inherent validity as against the validity of the appointment made thereunder.

As a general testamentary power is normally accepted as a general power, we are inclined to agree with the English Law Reform Committee that no change should be recommended in classifying it as a special power since this might indeed create a new trap for draftsman in an act which is designed to remove as many traps as possible. Further, having the validity of such appointment considered from the time of the exercise of the power involves an extension of validity to interests created by will and from a long range point of view this is basically the underlying considerations for reform in the present rule against perpetuities. While, therefore, approving of a definition which would clarify the

basic consideration for characterizing a power as general and treating all other powers as special, it will be necessary to make an exception for the anomalous case of a general testamentary power which normally under the basic definition might have been considered as special.

(i) Administrative Powers

An instance of the rule against perpetuities being applied mechanically and without regard to its proper function and purpose is the case of administrative powers like powers of sale, powers of leasing, etc., which in England, on the basis of such a decision as Re Allott, [1924] 2 Ch. 498, have been held invalid on the ground that they might be exercised after the perpetuity period had run. As the basic object of the rule against perpetuities is to restrict the tying up of property, and as a power to sell, lease, or otherwise deal with property facilitates the alienability of property, it is difficult to justify the application of the rule to instances of this kind. (See Leach, Powers of Sale and Trustees and the Rule Against Perpetuities (1934) 47 Harv. L.R. 948.) So long as a trust, to which such power is added, is itself valid, there seems to be no possible reason for applying the perpetuity rule to prevent trustees from exercising any administrative powers given to them. A legislative change to this effect was made in New South Wales in 1929 and it has been adopted in Victoria and now in Western Australia (see Morris and Leach, p. 235). While the problem does not seem to have arisen for decision in Canada, it would appear that in any general reform of the perpetuities rule, provision should be made for excluding powers of this kind from the operation of the rule. Following the recommendation of the English Law Reform Committee as adopted in the 1964 Act, we believe that the validation of these powers should be given retrospective effect unlike the other recommendations

which will only apply to instruments coming into effect in the future. The reference to a provision for remuneration of trustees is undoubtedly based on the decision of Re McConnell, [1956] N.I. 151, and should probably be inserted ex abundante cautela.

(j) Options

The relation between options and the rule against perpetuities is a confused one. Since the rule against perpetuities is, generally speaking, a law of property and not a law of contract, to the extent that an option remains as a mere contract between the parties it has indefinite validity. On the other hand, since an option to purchase land was specifically enforceable and gave the option-holder an equitable interest in the land, which interest was contingent on the exercise of the option, such a contingent interest would be held void unless it must vest within the perpetuity period. This confusion between contract and equitable interest, carried on in a realm of abstract thought, has had many strange results. For example, even though specific performance is denied against successors of the option giver in England, if the option is too remote, none the less, the holder of the option can sue the giver of the option for damages for breach of contract. (Worthing Corporation v. Heather, [1906] 2 Ch. 532, approved in Bennett v. Stodgell (1916), 28 D.L.R. 639, 642 (Ont. C.A.). On the other hand, it has been held that as against the original option-giver — apart from his successors — the rule against perpetuities has no application to an action for specific performance on the ground that specific performance is merely given when damages are not an adequate remedy for the enforcing of a personal obligation with which the rule against perpetuities had nothing to do!

It would seem eminently desirable to free the law from this inconsistent

manner of dealing with options. There is something wrong in treating an option as fully enforceable both by way of damages and specific performance if the original parties are the same — even though such parties may be corporations with perpetual life, and yet failing to give specific performance against a third party who bought the land with notice of the option. Morris and Leach, 2nd ed., p. 226, state the present condition of the authorities in the following two propositions:

> "(a) If A gives B an option to purchase land which is unlimited as to time, the option can be specifically enforced against A as long as he still owns the land. If A transfers the land to C, the option cannot be specifically enforced against C. But B can collect damages from A or A's estate.
>
> (b) If A leases land to B for any term exceeding twenty-one years and gives B an option to purchase the reversion at any time during the term, the same rules apply. That is, the option is specifically enforceable against A as long as A holds the reversion; if A transfers the reversion to C, the option cannot be specifically enforced against C; but A or his estate is liable in damages."

As the authors say, following these propositions: "It is suggested that the mere statement of these rules in sequence indicates the need for a review of the option problem and corrective action."

Whether options should be subject to the rule against perpetuities at all has been seriously questioned. What is required in viewing this whole field is to examine their operation in light of the policy which the rule against perpetuities purports to advance. As the authors, Morris and Leach, point out at

p. 224, the rule against perpetuities took its origin in connection with family settlements and the rule was designed to fit the needs of family gift transactions. To derive from such a rule a general concept applicable to commercial transactions seems unnecessary and dangerous. For one thing, lives in being have no significance, nor does the period of twenty-one years. Further, the option strikes down bargains negotiated between persons usually of competence and keen commercial ability.

Again to quote Morris and Leach, p. 224: "The usual case involves an option which the option-holder attempts to exercise within a very short period; the Rule against Perpetuities is seized upon by the owner to escape from his contract on the ground that the option-holder might have exercised the option too remotely — a situation which does not appeal to the common sense of businessmen or the ethical sense of anyone. Like the late lamented Statute of Frauds, the Rule becomes a destroyer of bargains which in all conscience ought to be performed."

The problem of the option to purchase is succinctly stated by the same authors and is reproduced here in order to point the principles applicable to a study of this question:

> "A case can be made out for imposing some time-limit on options to purchase land in gross (that is, those not contained in a lease of the land). Where A owns Blackacre and gives B such an option, A is inhibited from developing or improving the land, for B can at any time exercise the option and thus take the benefit of A's labour and investment. The period of perpetuities is far too long a time in which to allow such options to be valid, for in skilful hands the period can be

made to last about a century. However, in such cases the self-interest of the parties can be relied upon to see that long-term options are kept well within the limits of the public interest. An owner of land will not be likely to give such an option if development of the land is a real possibility; and if such an option is given, the self-interest of the option-holder will lead him to exercise the option and develop the land as soon as such action offers an opportunity for profit.

The application of the Rule to options in a lease is particularly obnoxious in that it defeats the basic purpose of the Rule. Here the situation is the exact opposite to that which exists in an option in gross. The option-holder, not the option-giver, is in possession of the land. He is the only person who can develop the land during the continuance of the term. The improvement of the land is stimulated, not retarded, by the existence of the option. If the lessee has an option to purchase he can safely improve; for, by the exercise of the option, he can preserve to himself the benefit of the improvement. If he has no option, he must (unless statute intervenes) so regulate his improvements that they are overtaken by obsolescence at the end of the term. An option to purchase in the tenant, regardless of the length of the lease, is important to procuring the full utilisation of the land: and this, after all, is one of the basic purposes of the Rule against Perpetuities.

It is not surprising that English courts should have been tempted to whittle away the doctrine that options are subject to the Rule. But, assuming that that doctrine exists, it cannot be said that their efforts have made the situation much better. There would seem to be no

justification for holding the option not specifically enforceable against assigns of the option-giver but enforceable against the option-giver himself. The objection to a long option, from the point of view of the public interest, is that it inhibits the improvement of the land by the owner in possession. This is equally true whether the land is held by the original option-giver or by his transferee. Nor can there be any justification for refusing specific performance against the option-giver's assigns but granting money damages against the option-giver or his estate. For this means that the option-giver will not dare to convey the land to a transferee, for the transferee might greatly increase the value of the land by improvements and thus increase the liability in damages of the option-giver. Something seems amiss when the Rule against Perpetuities actually inhibits the free alienation of land."

The law is well settled that options to renew a lease, even though they be perpetual options, are not subject to the rule against perpetuities (see the cases in Morris and Leach, p. 223).

There has been no objection to this rule from any source and it would appear that an option to purchase given to a lessee should be freed from the rule against perpetuities in order to facilitate the full utilization of the land. Such a view was adopted by the English Law Reform Committee and we agree with their conclusion.

With regard to options to purchase which might be called options in gross, the authors of Morris and Leach think the simplest and best reform would be to enact that the rule does not apply to options of any kind on the ground that it

is wrong to strike down bargains freely entered into in the absence of any convincing evidence that such options affect public policy. A strong reason for assuming they do not is found in the case of New York State where options unlimited as to time are valid and specifically enforceable, and apparently no difficulty seems to have arisen, nor any demand for a change.

The English Law Reform Committee felt that some limitation on options in gross was required since they tended to discourage rather than foster the maintenance and development of the land in question and it was frequently difficult to trace the devolution of the benefit of options which, with the passage of time, might have a very substantial value owing to changes in the area in which the land was situate. That Committee therefore suggested that a fixed period of years without reference to lives was desirable and without being dogmatic they selected twenty-one years, although they were quite agreeable to such a period being extended to thirty or fifty if pressures were brought for an extended period from interested parties.

It is clear that legislation is needed in this field to clear up the present inconsistencies so that options are either valid, by way of specific performance or otherwise by immediate parties and their successors, without limitation of time or with a limitation period of twenty-one yars. We recommend the latter.

(k) Possibilities of Reverter and Resulting Trusts

Since Re Trustees of Hollis' Hospital, [1899] 2 Ch. 540, it has been settled that the rule against perpetuities applies to a right of re-entry for a condition broken. (See Re St. Patrick's Market (1909), 1 O.W.N. 92; Matheson v. Town of Mitchell (1919), 51 D.L.R. 477 (Ont. C.A.); Fitzmaurice v. Board of School Trustees of Monck Township, [1950] 2 D.L.R. 239 (Ont.). As a result,

if a fee simple in land is left to a person subject to a condition subsequent, for example, "a grant to A and his heirs but if the premises are ever used as a hotel, then the grantor or his heirs may re-enter", as the event on which the property is taken away from A might take place (under the rule without "wait and see") at a time beyond the perpetuity period, the right of re-entry depending on the remote condition is void and the grant to A and his heirs remains an absolute grant unaffected by the condition subsequent.

The situation with regard to possibilities of reverter following determinable interests is more questionable. For some time it was thought to be impossible to create a determinable fee, i.e., a grant in fee simple which would automatically be limited by some event without the necessity of a right of re-entry, e.g., "to A and his heirs while such property is used as a private residence". The theoretical problem of the validity of these interests now seems to be dispelled (see Morris and Leach, 2nd e., p. 210), and the only question is one concerning the application of the rule against perpetuities. It has been argued, and it is held in most American states, as well as in some English and Irish authorities, that as the rule against perpetuities is concerned with "vesting" and is not concerned with the duration of an interest, the possibility of reverter which arises under the original limitation is deemed a vested interest and therefore does not offend the rule. A somewhat similar view has been stated with regard to English cases in which personal property has been given on trust "so long as a certain state of affairs continues to exist". Whether these were charitable purposes as in Re Randell (1888), 38 Ch. D. 213, or non-charitable as in Re Blunt's Trusts, [1904] 2 Ch. 767, made no difference. The equitable interest in the original beneficiary was vested and the Court assumed there was a vested

interest retained in the grantor by way of resulting trust which would pass under his residuary estate. This was the case in Re Chardon, [1928] Ch. 464.

There are difficulties in this line of reasoning. (a) Whether a donor uses the technical language of a condition subsequent or the language of limitation, the property is tied up indefinitely for the remote future in exactly the same way and therefore if the rule affects the rights of re-entry, it should also affect the possibility of reverter in order to free the property from this remote interest. To have a difference in result depending on a mere matter of words does not seem to make sense and brings the law into disrepute, as well as acting as a snare for the draftsman. (b) It is exceedingly strange that even cases like Re Chardon, supra, which recognize the validity of a determinable interest in a trust, refused to recognize, because of the rule against perpetuities, a gift over to another individual on the remote event determining the earlier limitation. At the same time, the case recognizes that the donor, having a vested interest in the resulting trust, can leave this property by way of a residuary bequest and therefore it becomes a simple matter of how this remote interest is disposed of.

As stated in Alberry, Some Further Reflections on Re Chardon (1938), 54 L.Q.R. 258:

> "There is no magic in a residuary bequest. Either a testator has power to dispose of a certain property or he has not. The precise manner of disposition is immaterial. Why it should be considered more efficacious to have two bites at the cherry by directing in clause 4 that the property shall fall into residue and then in clause 23 that the residue is to go to Simpkins, I am at a loss to understand."

(c) The point of the matter is that the property interests involved in these

limitations, whether in the nature of a determinable fee or an equitable interest, require for the termination of the first interest the happening of an uncertain event, which event, in substance, apart from form, is a condition precedent to the possibility of reverter or the resulting trust being efficacious. This is realized in the "right of re-entry" cases but at the present time the law with regard to determinable fee and resulting trusts is obscure, and tends in the opposite direction.

It is true that in one decision, Hopper v. Liverpool Corporation (1944) 88 S.J. 213, a single judge did apply the rule against perpetuities to a possibility of a reverter in land, following a determinable fee, but in view of the criticism of this case by some of the real property pundits who insist on making a distinction in terms of feudal doctrine little applicable to the policies behind the rule against perpetuities, we believe it advisable to clear up any possible misapprehension.

The difficulties and absurdities which follow under the American and semble the majority of English cases recognizing that these determinable interests are not subject to the rule against perpetuities are well developed in Morris and Leach, 2nd ed., pp. 209-217. The English Law Reform Committee adopted the reasoning of Morris and Leach and recommended that possibilities of reverter and resulting trusts analogous to possibilities of reverter should be made subject to the rule against perpetuities, whether the initial trusts were charitable or non-charitable. We agree with this recommendation and believe it should be adopted in Ontario.

Assuming the adoption of the "wait and see" principle recommended earlier, this would mean that in a gift of property on a limitation without time,

whether a devise of land or a bequest of personal property by way of trust, in the absence of any relevant lives being specified, the perpetuity period would be twenty-one years and if the event determining the original limitation had not happened within that time, then the first interest would become an absolute interest and the possibility of reverter, or the resulting trust as the case might be, would be void.

In recommending this change, it is interesting to note the fantastic results that the present state of the law, as represented by Re Chardon, might make possible. For example, an eccentric testator might conceivably leave all his estate on trust to pay a corporation all the income (say, $50,000 a year) so long as the corporation paid $45,000 a year to whomsoever was his lawful heir at any given period of time. Presumably, Re Chardon might condone this type of limitation and allow the money to be tied up for this period of time with the possibility of a resulting trust back to the donor. On our recommendation, the corporation would take the absolute interest after a twenty-one year period.

(l) Purpose Trusts or Trusts for Non-Charitable Purposes

Apart from trusts for charitable purposes, which are well-established, although difficult of definition in connection with the term "charity", trusts for purposes other than those coming within the charitable field constitute a section of the law in which confusion and arid conceptualism seem to supplant any rational basis for the development of the law.

Although some "non-charitable purpose" trusts have been supported, the arguments against their validity have taken the following forms:

1. It is said that while words like "charity" or "charitable" have definite meanings and the Court can therefore keep the trustee within recognized

legal bounds, others such as "benevolence", "patriotic", etc., are so vague and uncertain that the courts could not control a trustee in the exercise of his discretion and the trustee would have powers tantamount to absolute ownership. Morice v. Bishop of Durham (1804), 9 Ves. 399, is the leading authority upon which hundreds of decisions have been based.

2. A somewhat similar line of authority stresses the fact that testators are not permitted to delegate their testamentary power save in the case of charitable gifts, and to leave to the trustee the power to select amongst wide and uncertain purposes is tantamount to such a delegation (see the cases in Morris and Leach, 2nd ed., p. 308).

To the extent that the terms of a trust are vague and uncertain, we believe there is no reason of sufficient importance to challenge these holdings. The above reasoning has no application, however, to the case of specific non-charitable purposes, where there can be no question of the limits on a trustee's discretion to apply the money which he receives on trust. For example, the maintenance of specific tombs or graves, the maintenance of specific animals, the saying of masses for the repose of souls, the promotion of fox-hunting, etc.

In approaching these cases, it must be understood that there is a sound underlying principle which must be observed, namely, that if a court is convinced that a purpose is harmful, capricious, unlawful or contrary to public policy, the trust fails. An illustration of this is the direction to block all the rooms in a house for twenty years. (Brown v. Burdett (1882), 21 Ch. D. 667). Other clear cases such as throwing money into the sea may be compared with more borderline cases such as the devotion of large sums of money for the erection of bronze statues in memory of the testator or the firing of salvos on the

anniversary of the testator's death, and may be found in Morris and Leach, 2nd ed., p. 319.

Apart from these cases, there would seem to be no public policy in avoiding a trust for a specific non-charitable purpose which was not capricious or contrary to public policy. A testator is normally presumed to be capable of doing by will what he could himself have done if living. This view is fundamental to our whole doctrine of freedom of testation.

Notwithstanding this, trusts for specific non-charitable purposes have had difficulty on one of two principles: (1) It has been said, and held in a few instances in recent English case law, that every trust must be for the benefit either of individuals or of charity and that there can be no trust without a cestui que trust. In other words, there must be someone who can compel performance of the trust and such person must be an individual or, in the case of charity, the Attorney-General in England or the Public Trustee here. This view was recently stated in Re Astor's Settlement, [1952] Ch. 534.

This view has been condemned by many writers on trusts and their almost unanimous opinion is that set out in the American Law Institute's Restatement of Trusts, s. 124, as follows:

> "Where the owner of property transfers it in trust for a specific non-charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no enforceable trust is created, but the transferee has power to apply the property to the designated purpose, unless such application is authorized or directed to be made beyond the period of the rule against perpetuities, or the purpose is capricious."

This view was, in our opinion, unfortunately, rejected by Harman, J., in Re Shaw, [1957] 1 W.L.R. 729, on the ground that "a valid power [can not] be spelled out of an invalid trust". To the same effect is Lord Evershed in Re Endicott, [1960] Ch. 232. Even though a trustee can not be compelled to perform in cases of specific non-charitable purposes, if he is willing to perform there seems no reason why he should be prevented from doing so, and the interest of the residuary legatees or next-of-kin who would take on failure of the trust should be sufficient to see that he is kept within the bounds of his discretion.

Apart from this conceptual approach, the greater number of cases relies on a second argument to strike down such trusts, viz., the rule against perpetuities. There seems no necessity to stress that this is a somewhat different application of the rule against perpetuities than we normally find, since the rule is basically concerned with "vesting" and, obviously, vesting in these cases is out of the question.

The problem here is that if a trust for a non-charitable purpose is, on the rule as originally stated, likely to last longer than the perpetuity period, it is struck down as void. The courts have not been particularly happy about this and have sometimes used ingenious methods of avoiding the perpetuity doctrine. For example, in Re Kelly, [1932] I.R. 255, the testator gave one hundred pounds to his trustees for the purpose of expending four pounds on each of his four dogs per year. The gift was upheld because of the ingenuity of counsel and the court in finding that the gift could be split in a series of annual payments, the first twenty-one of which were valid. This does not seem a very satisfactory method of dealing with the case and the decision itself is usually viewed as an oddity rather than an illustration of the existing law.

It is also held that if a testator uses a form of words such as "so long as the law allows", or "so long as they legally can do so", the courts will uphold the gift for a period of twenty-one years. As most testators are attempting to do only what they can legally do, it would seem sound that purpose trusts should, as a general rule, be supported for the period of perpetuity, even though such words are lacking.

See, for example, the following extract from Sheridan, Trusts for Non-Charitable Purposes (1953), 17 Conv. (N.S.) 46 at 54:

> "A testator who leaves income for the repair of a tomb for twenty-one years makes a valid gift, while one who places no such time limit fails to give at all. It is hazarded as a selfish speculation that most of the testators who purport to give indefinitely or for ever would prefer to have their purposes carried out for the perpetuity period rather than have them collapse altogether. Clauson, J., in Re Topham, [1938] 1 All E.R. 181 at 185, one of the latter class of case, said: 'I may perhaps be permitted to say — though I do not suppose it is of any consolation to anybody — that I do feel, in coming to that decision, that I am setting at nought the perfectly plain intention of the testator.' These are words of regret, not of exultation. To defeat the intention of the testator is one of the recognised and vital functions of equity judges, but a rule of equity which does so capriciously is garbage. There is no apparent reason why at least an indefinite (if not a purportedly perpetual) purpose trust should not be upheld for the perpetuity period and no longer. After all, a testator only wants to do what the law allows: the idea of a testator setting out to draw elaborate

dispositions with the intention that they shall infringe rules of law and be held void is grotesque. Yet equity apparently draws a distinction between a testator who wants to do what the law allows and one who says so in his will."

The suggestion of Sheridan seems to be generally accepted (see Morris and Leach, 2nd ed., pp. 321 et seq.). Most of the writers confine their argument for validity to the case where a testator does not expressly state his desire to establish a trust in excess of the perpetuity period. For example, most writers have indicated that if a testator expressly set up a trust for the expenditure of income in perpetuity for a non-charitable purpose, this should be struck down. In view of the uncertainty concerning what is or what is not a charity, we feel this is unduly harsh. For example, there is one English authority which holds that masses for the repose of the testator's soul is a charitable trust (Re Caus, [1934] Ch. 162.) An Ontario decision held that a trust which left income forever for saying such masses was not charitable and was void for offending the perpetuity rule (Re Zeagman (1916), 37 O.L.R. 536). In light of the fact that recent English cases have cast doubts on the charitable nature of such bequests because of an increasing emphasis on the element of public benefit (Gilmour v. Coates, [1949] A.C. 426 at 451 and 454), we believe that some remedial legislation is required to permit the courts to give effect to what would undoubtedly be the probable intention of the testator if he were told of the invalidity of the disposition of property he had made in his will for purposes of this nature. In our opinion, the great majority of testators would probably have preferred validity for a period of twenty-one years as against total invalidity. We therefore recommend a provision by which all specific non-charitable trusts can be valid for a period of

twenty-one years (unless an astute testator makes use of a provision for existing lives in addition to the twenty-one year period.)

There may be some cases where a testator has contemplated and expressly provided for a perpetual trust, and where a limited period of validity for twenty-one years might, conceivably, be of such little value that a court would reach a conclusion that the testator would prefer total invalidity rather than the partial validity we are now recommending. In such cases, we believe the court should have a discretion either to award partial invalidity or to strike the entire limitation down. We think such cases will be rare but, rather than frustrate testators' intentions in the way in which many of the cases do, we feel that his flexibility is warranted and we so recommend.

(m) The rule in Whitby v. Mitchell (1889), 42 Ch. D. 494

The rule in Whitby v. Mitchell which has sometimes been called the Old Rule Against Perpetuities, provided that "after a limitation for life to an unborn person, any further limitation to his issue was void". The origins in history of the rule are obscure and there seems general unanimity that, granted the modern rule against perpetuities, there is no longer any necessity for keeping this obscure relic of an earlier day on the books to the confusion of courts and practitioners. The rule was expressly abolished by the English Law of Property Act, 1925, s. 161, and similar statutes have been adopted in British Columbia, New South Wales, Victoria and New Zealand (see Morris and Leach, 2nd ed., p. 257).

While the rule has not been applied in Ontario, the existence of the rule has been referred to in Re Phillips (1913), 11 D.L.R. 500 (Ont.); Stewart v. Taylor (1914), 33 O.L.R. 20.

As a mere matter of clearing out unnecessary obscurities — unnecessary

because the principle of the modern rule covers all cases that would have been invalidated by this earlier rule — the time has come to place a quietus on a rule which has no practical application at the present time, and we so recommend.

Related Questions

(a) Accumulations

In light of the fact that the law regulating accumulations is an aspect of "tying up" property, and since theLaw Reform Committee in England has made certain recommendations with regard to amending the Accumulations Act, we feel, in the interest of completeness, that we should deal with the possibility of changes in that Act, as well as the rule against perpetuities.

The Accumulations Act has been in substantially the same form since 1800 and at present provides for accumulations in one of four periods: (a) the life of the grantor or settlor; (b) twenty-one years from the date of the death of the grantor or testator; (c) a period of minority of any person living at the death of the grantor or testator; and (d) a period of minority of persons who would if a full age have been entitled to the income.

There are obvious gaps in these periods, particularly in the case of inter <u>vivos trusts</u>, which may not have been of such practical importance originally, but they have assumed increasing importance with the advent of estate planning. For example, a person setting up an <u>inter vivos</u> trust has no fixed period of years as he has in the making of a will and he cannot direct an accumulation for twenty-one years from the date of the creation of the trust (see <u>Re Bourne's Trusts</u>, [1946] 1 All E.R. 411 at 415. We can see no reason, as the English Law Reform Committee saw no reason, for not recommending that the settlor under an <u>inter vivos</u> trust should have this period of twenty-one years in

the same way that he has it under a will.

A similar point arises in connection with the minorities of persons. At the present time the Act deals only with minorities of persons living at the death of a grantor. This obviously excludes accumulations during minorities of persons living at the time of the creation of an inter vivos trust.

Following the recommendations of the English Law Reform Committee, we believe that there is no reason for making this distinction between wills and inter vivos trusts and we accordingly recommend that the periods under the Accumulations Act be amended by adding these two periods.

The English Law Reform Committee also recommended that the Act make clear that the statutory restrictions applied to accumulations at simple interest as well as to compound interest. While the weight of authority may bear this out at the present time, there is room for argument in view of some of the recent cases, as indicated by the English Law Reform Committee, which warrants putting the matter to rest and we so recommend.

It is probably just as well in making a comprehensive revision of these statutes to add a clause similar to the precautionary recommendation of the English Law Reform Committee, to the effect that restrictions on accumulations apply to powers to accumulate as well as to directions to accumulate. This has been held in Re Robb, [1953] Ch. 459, but the English Law Reform Committee felt it desirable that the statute should provide more stable support for the position. As any statutory revision should seek to eliminate litigation as much as possible, we feel it wise to include such a provision.

We also believe that it is probably wise to follow the wording of the revamped English statute in this connection, if for no other reason than that we

could avail ourselves of the extremely able decisions of the Chancery Courts in England on the statute without the necessity of cavilling over details in language.

(b) General provisions regarding the ability to bear children

While we have recommended that provisions be inserted in the proposed Perpetuities Act, making the issue of the possibility of having children a question of actual fact, assisted by presumptions having some foundation in medical science, we feel that these provisions should apply beyond the perpetuity field. For example, under Saunders v. Vautier (1841), 4 Beav. 115, beneficiaries of a trust who are sui juris can together put an end to any directed accumulations under a trust and otherwise act to terminate the trust itself. So long as there is a possibility of other beneficiaries coming into existence, existing beneficiaries cannot exercise this power and the courts have sometimes, unfortunately and unnecessarily, introduced the conclusive presumptions that a woman of any age can have a child, with the result that the question ceases to be one of fact, and trusts may not be terminated in accordance with the actual fact situation. See, for example, Re Deloitte, [1926] Ch. 56; Teague v. Trustees, etc. Co. Ltd. (1923), 32 C.L.R. 252. We believe that the same provisions that we have recommended for application in connection with the rule against perpetuities should apply for all purposes relating to the distribution, transmission, or devolution of any property whenever any question of the possibility or impossibility of a person having future children may arise for decision. We believe that a provision of this kind could best be inserted in the general provisions of the Trustee Act and we so recommend.

Actual Proposals for Reform

In this Part we summarize some of the concrete proposals recommended

in Part I of this report. At the same time, those concrete proposals reach forward to the form of the statute recommended in Part III of this report. Some specific illustrations will be given in this Part concerning the operation of some of the specific proposals, as they are carried forward into the proposed statute of Part III. In other words, this Part is a recapitulation of specific recommendations and, as well, provides some concrete illustrations of the way in which some of those proposals, if enacted, should operate.

We recommend that a statute, to be known as The Perpetuities Act, be enacted in Ontario to cover the following specific proposals:

1. The existing rule against perpetuities still furnishes the background of our law and so far as this is not changed by the amending statute it should be made clear that such law still remains in effect. See the proposed section 2 of the recommended Act.

2. The most important recommendation we make is that which incorporates the "wait and see" principle, and as this is a fundamental change, we believe it should be spelled out in clear and simple language so that there will be no mistaking the changes from the existing law. To this effect, we believe there should be:

(a) a statement that no limitation fails simply because of a possibility that it might offend the perpetuity rule. See proposed section 3.

(b) a statement that every limitation which might or might not vest within the perpetuity period shall be presumptively valid until actual facts show that it is either invalid, or valid for all purposes. See section 4(1) of the proposed Act.

(c) for purposes of clarity, we think there should be a statement

expressly dealing with the application of this new principle to the increasingly important field of powers of appointment and this has been done in subsections (2) and (3) of section 4. There should be a statement that anyone interested under the limitation may at any time apply to the Court for a declaration concerning invalidity or validity of a limitation which is presumptively valid. See section 5(1) of the proposed Act.

(d) As a consequence of the presumptive validity already referred to, we feel it sound to provide that pending the occurrence of actual events — that is, during the period of presumptive validity — the intermediate income shall be dealt with as though the limitation were valid from the beginning, disregarding the possibility of its future invalidity. See section 5(2) of the proposed Act.

(e) Inasmuch as there is no fixed period for determining the validity or invalidity of a limitation which might or might not vest within the perpetuity period, there is a theoretical difficulty in choosing the life or lives in being.

Professor Leach has consistently taken the view, in all his writings, that there is no serious problem involved here and that it should be left to the Court to work out the choice of lives without any necessity of definition in an amending statute. On the other hand, this has been one of the most frequent attacks made on some of the amending statutes in the United States and the point may be raised by opponents to the suggested recommendations made by us concerning the adoption of the "wait and see" principle.

For example, Simes has used the illustration that an eccentric testator might conceivably leave his property to such of his lineal descendants who are alive 120 years after the testator's death. He has argued that if any person in the world could be found who was alive when the testator died and who had reached

more than ninety-nine years after the testator's death, the limitation would be good. This might conceivably be the case and to argue, as Leach does, that this is a pure eccentricity which should not impede the general adoption of the sound principle may not satisfy critics who are looking for more certainty in the property field.

It was, undoubtedly, to meet such criticisms that the English Act of 1964 set out an elaborate enumeration of persons who could be considered to be lives (see section 3(4) and (5) of the English Act). We do not agree with the necessity of placing the "wait and see" principle within such rigid bounds and we believe that there should be flexibility given to a Court in the choice of lives, but there should also be some protection against the remote possibility of choosing lives from a telephone directory to meet exotic cases such as Simes has used in his opposition to the "wait and see" principle.

In the section we have proposed (section 6), we have used a modified form of the provision first enacted in the Kentucky statute referred to in Part I of this report, which provides for excluding lives of persons "whose continued existence does not have a causal relationship to the vesting or failure of the interest". Because we realize that words such as "causal relationship" are unusual in this context without being precise, we have used "reasonable connection" and followed this with other general terms all of which, in our opinion, adequately cover what we are aiming for, namely, a wide discretion excluding the exotic. See the proposed section 6(1)(c) and (d).

The best explanation of the "causal relationship" notion is given in Waterbury, Some Further Thoughts on Perpetuity Reform (1957), 42 Minn. L.R. at p. 66. Commenting on the provision, which has been adopted in the Kentucky

statute, he states:

"The thought behind this provision is obvious enough. The common law method of selecting measuring lives requires a particular cause in fact relationship of the lives to vesting, i.e., a relationship which insures vesting or failure of the interest within twenty-one years after termination of the lives. In the above statute, an effort is made to broaden this requirement to one of a cause in fact relationship, and at the same time to avoid the problem of selection with the benefit of hindsight by the requirement that only lives having some cause in fact relationship to the continuance or termination of the challenged interest when the period of the rule commences can qualify."

To illustrate his general observation he uses the following example: T by will makes a gift to the children of A (a living person) who graduate from Reed College. Waterbury's comments are as follows:

"We select measuring lives at the outset. They are: (1) A (assuming that he may have more children) because the maximum membership of the class cannot be determined as long as A can add more members. (2) Any living children of A. (If A's living children have graduated from Reed, their lives increase the likelihood of vesting, or decrease the likelihood of failure, and hence qualify on either count. What about children of A who are in being but have not yet graduated from Reed? Their lives increase the likelihood of vesting or decrease the likelihood of failure, also. Hence they qualify.) (3) A's present spouse, if any (as a co-source, with A, of additional members of the class). But not an after-acquired spouse because the required relationship would not

have existed at the commencement of the perpetuities period."

If a very careful draftsman seeking a lengthy period of limitation has expressly picked out ten named lives, then those lives can be used under our proposed section either under subsection (d) of section 6, or under subsection (c), in the sense that the existence of such extraneous lives now have a reasonable connection by virtue of having been selected by the testator himself.

Professor Simes has used the following illustration in opposition to the adoption of "wait and see": T devises Blackacre "to the B Church in fee simple; but if the land should ever cease to be used for such church purposes, then to C in fee simple". Undoubtedly, at common law the executory interest to C is void and the B Church itself has a fee simple absolute. According to Simes, if we adopted the principle recommended in this report "we would have to wait until the condition happens before knowing whether the title to the church is good". He indicates that you might have to wait for 125 years to see if some particular measuring life could be found.

We believe this criticism to be unfounded. As there is no life of any particular individual having any reasonable connection with the future uncertain event of the land ceasing to be used for church purposes, then no life should be involved and the perpetuity period is a straight twenty-one years. We have so provided in section 6 and, together with the language used in subsection (b) and (c) of our proposed section 6, we can envisage no particular practical difficulty in courts, or for that matter, practitioners without the aid of courts, deciding on what lives might be relevant for ascertaining at any time the validity or invalidity of a given gift.

(f) In order to avoid any possible absurdity arising from the attitude

of the court in presuming persons of any age capable of having children in the future, a provision providing for certain presumptions, e.g., regarding the inability of women over fifty-five to bear children, and the possibility of receiving evidence on the ability or inability of any person to have children at a future time, should be provided so that on actual events this question, like any other question of fact, could be established on actual evidence.

In making provisions of this kind and for findings that persons could not have children at a given time, provision should also be made for protecting the right of any child who might subsequently be born contrary to the finding of the court. These provisions we have provided for in section 7 of the proposed Act which, in the main, follows the provisions of the English Act of 1964 with certain changes.

(g) As discussed in para. (d) of Part I, in cases where the "wait and see" principle would not render a limitation valid, we recommend that where such invalidity might result by reference to the attainment of any person of an age over twenty-one, the court shall have the power of reforming the will by reducing that age to the age nearest that specified by the testator which would have prevented the interest from being void.

We believe that this provision, substantially taken from the English Act of 1964 achieves the flexibility discussed in Part I of this report, para. (d).

As illustrations of what might happen under these proposed changes, the following examples are given:

T bequeaths $10,000 to the children of A who shall attain 25.

(a) Apart from the changes recommended by us, this limitation would be void as offending the rule against perpetuities unless A

happened to have a child aged 25 at the time when the testator died, in which case the class would close on the testator's death and the existing children of A would have been lives in being.

(b) Assume that on T's death A is living and has one child, aged 2. Under the "wait and see" principle, the gift would be presumptively valid. Assume further that A now dies, leaving only the one child who, on A's death, is now aged 4. Under the "wait and see" principle, the gift to such child is valid since he will take at age 25 which is within 21 years of a life in being, namely, his father, A. The child, as a life in being, will also, on the "wait and see" principle, take in his own lifetime.

(c) Assume that on A's death he has two children living, aged 6 and 2, neither of whom were living on T's death. It is obvious that under these circumstances the "wait and see" principle will not save the gift to the youngest child according to the terms of the will since he cannot possibly attain 25 within 21 years of A's death. Had the age been 21, the gift would have been valid, but to postpone the vesting of the gift so long as possible to accord with the testator's intention and in accordance with the section as proposed by us, the age on which children will take the vested interest will now read 23. This would permit all (2) children of A to obtain a vested interest within 21 years of A's death.

(h) If "wait and see" together with a reduction of ages in excess of twenty-one do not save a gift because of the operation of the "class gift" rule (all or nothing), then there should be a provision to the effect that the gift to a class is not invalidated by the failure of some members only of a class to satisfy

the requirements of the rule and the limitation should take effect only with respect to members who come within the period.

Section 8 which follows the careful wording of the English Act of 1964 provides for the class gift situation in two cases: One, where the age limit has been reduced in accordance with the provision previously recommended, and the other where the gift would fail on the class gift principle without a reduction in years.

The latter is understandable and simply repeals the Leake v. Robinson rule considered in Part I, para. (e).

It is more difficult to envisage a case where the age has been reduced which would require the application of the class gift principle but it is possible. For example, a testator might leave to the grandchildren of M, a living person, who attain the age of 30 years. So long as M and his children who were living on the testator's death are still living, the "wait and see" principle should operate in order to see if any of the grandchildren would attain thirty in their lives. It is possible that when M and his two children, who were living on the testator's death, died, it might be necessary to reduce the age of thirty to make valid the gift in favour of children of children who were living on the testator's death. It might then happen that a child of a child of M who was not living on the testator's death would become a potential member of the class and such child would not necessarily take within 21 years of lives in being. The proposed section would then operate to limit the class to those children who would satisfy those provisions.

(i) In view of the case with which draftsmen and testators inadvertently use language which might possibly include an unborn spouse, in the sense

of a person who is not in being on the testator's death, we believe that despite the wide effects of the "wait and see" principle, there should be a provision that, for the purpose of the rule against perpetuities, where the gift is not otherwise saved by "wait and see", the spouse referred to shall be deemed to be a life in being even though such spouse was not actually born until after the commencement of the perpetuity period. See section 9 of the proposed Act.

(j) In accordance with the discussion in para. (g) of Part I, we specifically recommend the abolition of any doctrine by which an independently valid later interest is rendered invalid by reason of its "dependence" upon a prior void limitation. Attached to this should be a statement that such later interests are accelerated in the case of the invalidity of a previous limitation. See section 10 of the proposed Act.

(k) For the purpose of the rule against perpetuities every power of appointment should be treated as a special power other than a power under which there is a sole donee who could at all times appoint to himself; provided that for the purpose of considering the validity of an appointment made under a testamentary power, a power should be treated as general where it would have been so treated if exercised by deed. See section 11 of the proposed Act.

(l) No administrative powers of trustees shall be void merely because they might be exercised outside the perpetuity period. See section 12 of the proposed Act.

(m) Any option contained in a lease which enables the lessee to purchase the freehold or other reversionary interest should be wholly exempt from the rule against perpetuities. See section 13(1) of the proposed Act and para. (j) of Part I, <u>supra</u>.

(n) Any other option to acquire an interest in land should be valid for a period of twenty-one years from the time of its creation as against all persons but thereafter it shall be void even as against the original parties to such option. See proposed Act, section 13(3).

(o) Possibilities of reverter should be subject to the rule against perpetuities. See para. (k) of Part I, and section 14(1)(a) of the proposed Act.

(p) Interests in property arising by way of resulting trusts analogous to possibilities of reverter should be made subject to the rule against perpetuities. See Part I, para. (k) and the proposed Act, section 14(1)(b).

(q) Trusts for specific non-charitable purposes, in which there is no equitable interest created in any individual, should be valid as the exercise of a power on the part of the trustee so long as such exercise is made within the perpetuity period. In the case of such a trust which is expressly stated to be perpetual, the court should have an option either of declaring the trust partially good for the perpetuity period, or totally bad, depending on the view it takes of the result and its relation to the testator's probable intention. See proposed Act, section 15.

(r) The rule in Whitby v. Mitchell should be abolished. See proposed Act, section 16.

(s) In proposing a Perpetuities Act, we believe it more convenient to remove section 64 of The Conveyancing Act relating to the non-applicability of perpetuities to pension trusts, etc., to the new proposed Act. See Appendix D.

(t) The Perpetuities Act should apply only to instruments taking effect after this Act comes into force and this should include instruments executed under a general or special power of appointment, regardless of the date when

such powers were created.

(u) We recommend that the Accumulations Act be amended by adding two additional periods for which accumulations may be validly directed, namely, twenty-one years from the date of an inter vivos settlement and the minority or respective minorities of persons living at the date of a settlement inter vivos. We also recommend that subsection 1 of section 1 of the Accumulations Act be repealed and the provisions as set out in Appendix B of this report adopted to bring the wording more closely into accord with existing English legislation.

(v) In connection with accumulations, it should be made clear that the restrictions on accumulations apply to accumulations at simple interest as well as those at compound interest and to powers to accumulate as well as directions to accumulate. See proposed amendments to Accumulations Act.

(w) In accordance with the provisions in the proposed Perpetuities Act which makes the question of a person's ability or inability to have children at a certain time a question both of presumption and actual evidence, we recommend that a general provision should be inserted in the Trustee Act which makes similar provisions applicable to any question, including the right of any person to terminate a trust. See the proposed amendment of the Trustee Act in Appendix C of this report.

III

Recommended Legislation

Your Commission recommends the enactment of (a) a Perpetuities Act; (b) an amendment to the Accumulations Act; (c) an amendment to the Trustee Act; and (d) an amendment to the Conveyancing and Law of Property Act. A draft of the proposed legislation appears as Appendices A, B, C and D to this report.

All of which is respectfully submitted.

James C. McRuer, Chairman

H. Allan Leal, Commissioner

Richard A. Bell, Commissioner

W. Gibson Gray, Commissioner

William R. Poole, Commissioner

February 1, 1965.

Appendix A

An Act to modify the Rule against Perpetuities

Enacting Formula

Interpretation

1. In this Act,

(a) "court" means the Supreme Court;

(b) "life or lives in being" means a person or persons living or en ventre sa mere;

(c) "limitation" includes any provision whereby property or any interest in property, or any right, power or authority over property is disposed of, created or conferred.

Rule against perpetuities to continue; saving

2. The rule of law known as the rule against perpetuities shall continue to have full effect except as otherwise provided in this Act.

Possibility of vesting beyond period

3. No limitation creating an interest in real or personal property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.

Presumption of validity and "Wait and See"

4. (1) Every interest in real or personal property that is capable of vesting within or beyond the perpetuity period shall be presumptively valid until actual events establish either,

(a) that the interest is incapable of vesting within the period, in which case the interest, unless validated by the application of sections 8 and 9, shall be treated or declared to be void; or

(b) that the interest is incapable of vesting outside the perpetuity period, in which case the interest shall be treated or declared to be valid.

General power of appointment

(2) A limitation conferring a general power of appointment, which but for this section would be void on the ground that it might become exercisable beyond the perpetuity period, shall be presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.

Special power of appointment, etc.

(3) A limitation conferring any power, option or other right, other than a general power of appointment, which apart from this section would have been void on the ground that it might be exercised beyond the perpetuity period, shall be presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period.

Applications to determine validity

5. (1) An executor or trustee of any property or any person interested under, or on the invalidity of, an interest in such property, may at any time apply to the court for a declaration as to the invalidity with respect to the rule against perpetuities of an interest in that property, and the court may on such application make an order of validity or invalidity of an interest based on the facts existing and the events that have occurred at the time of the application and having regard to sections 8 and 9.

Interim income

(2) Pending the treatment or declaration of a presumptively valid interest within the meaning of subsection 1 of section 4 as valid

or invalid, the income arising from such interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest and any uncertainty whether the limitation will ultimately prove to be void for remoteness shall be disregarded.

Measuring lives and perpetuity period

6. (1) Except as provided in section 9 and in subsection 3 of section 13 the perpetuity period shall be measured in the same way as if this Act had not been passed, but in measuring that period by including lives in being when the interest was created, no lives shall be included other than those of,

(a) the person by whom or any person to whom or in whose favour an interest is given or created;

(b) a person or persons to whom an earlier interest in the same property may have been given;

(c) a person or persons whose continued existence has a reasonable connection with the vesting or failure of the interest; or

(d) a person or persons who would have been considered as a life or lives in being for the purpose of the rule against perpetuities if this Act had not been passed.

Idem

(2) Where there are no lives satisfying the conditions of subsection 1, the perpetuity period is twenty-one years.

Presumptions and evidence as to future parenthood

7. (1) Where in any proceedings respecting the rule against perpetuities a question arises that turns on the ability of a person to have a child at some future time, then,

(a) subject to clause b, it shall be presumed that a male is able to have a child at the age of fourteen years or over, but not under that age, and that a female is able to have a child at the age of twelve years of age or over, but not under that age or over the age of fifty-five years; but,

(b) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

Idem

(2) Subject to subsection 3, where any question is decided in relation to a limitation of interest by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question that may arise concerning the rule against perpetuities in relation to the same limitation or interest notwithstanding that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

Idem

(3) Where a question is decided by treating a person as unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned if the question had not been decided and if such child or children would, apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

Idem

(4) The possibility that a person may at any time have a child by adoption, legitimation or by means other than by procreating or giving birth to a child, shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but if a person does subsequently have a child or children by such means, then subsection 3 applies to such child or children.

Reduction of age

8. (1) Where a limitation creates an interest in real or personal property by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and actual events existing at the time the interest was created or at any subsequent time establish,

(a) that the interest, apart from this section, would be void as incapable of vesting within the perpetuity period; but

(b) that it would not be void if the specified age had been twenty-one years,

the limitation shall be read as if, instead of referring to the age specified it had referred to the age nearest that age that would, if specified instead, have prevented the interest from being so void.

Exclusion of class members to avoid remoteness

(2) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents subsection 1 from operating to save a limitation creating an interest in favour of a class of persons from being void for remoteness, such persons shall be excluded from the class for all purposes of the limitation and the limitation

takes effect accordingly.

Idem

(3) Where a limitation creates an interest in favour of a class to which subsection 2 does not apply and actual events at the time of the creation of the interest or at any subsequent time establish that, apart from this subsection, the inclusion of any persons, being potential members of a class, or unborn persons who at birth would become members or potential members of the class, would cause the limitation to the class to be void for remoteness, such persons shall be excluded from the class for all purposes of the limitation and the limitation takes effect accordingly.

Interpretation

(4) For the purposes of this section a person shall be treated as a member of a class if in his case all the conditions identifying a member of the class are satisfied, and he shall be treated as a potential member if in his case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

Condition relating to death of surviving spouse

9. Where a limitation creates an interest in real or personal property by reference to the time of death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of that person, for the purpose of validating any such limitation that, but for this section, would be void as offending the rule against perpetuities as modified by this Act, the spouse of such person shall be deemed to be a life in being at the commencement of the perpetuity period even though such spouse was not born until after that time.

Saving

10. (1) A limitation that, if it stood alone, would be valid under the rule against perpetuities, is not invalidated by reason only that it is preceded by one or more limitations that are invalid under the rule against perpetuties, whether or not such limitation expressly or by implication takes effect after, or subject to, or is ulterior to and dependent upon such invalid limitations or any of them.

Acceleration of expectant interests

(2) Where a limitation is invalid as infringing the rule against perpetuities, any subsequent interest that, if it stood alone, would be valid, is thereby accelerated.

Powers of appointment

11. (1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power unless,

(a) in the instrument creating the power it is expressed to be exercisable by one person only; and

(b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

Idem

(2) A power that satisfies the conditions of subsection 1 shall, for the purpose of the rule against perpetuities, be treated as a general power, but for the purpose of determining whether an appointment made under a power of appointment exercisable by will only is

void for remoteness, the power shall be treated as a general power where it would have been so treated if exercisable by deed.

Administrative powers of trustees

12. (1) The rule against perpetuities does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property, or to do any other act in the administration (as opposed to the distribution) of any property, including, where authorized, payment to trustees or other persons of reasonable remuneration for their services.

Application of subs. 1

(2) Subsection 1 applies for the purpose of enabling a power to be exercised at any time after this Act comes into force, notwithstanding that the power is conferred by an instrument that took effect before such time.

Options to acquire freeholds or reversions

13. (1) The rule against perpetuities does not apply to an option to acquire for valuable consideration the freehold or other interest reversionary on the term of a lease,

(a) if the option is exercisable only by the lessee or his successors in title, and

(b) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

Application of subs. 1

(2) Subsection 1 applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly.

Other options

(3) In the case of all other options to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities is twenty-one years, and any such option that

according to its terms is, or may be, exercisable at a date more than twenty-one years from the date of its creation is void on the expiry of twenty-one years from the date of its creation as between the person by whom it was made and the person to whom or in whose favour it was made and all persons claiming through either or both of them, and no remedy lies in contract or otherwise for giving effect to it or making restitution for its lack of effect.

Determinable interests

14. In the case of,

(a) a possibility of reverter on the determination of a determinable fee simple; or

(b) a possibility of a resulting trust on the determination of any determinable interest in real or personal property,

the rule against perpetuities as modified by this Act applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise on its breach to a right of re-entry or an equivalent right in the case of personal property, and, where the event that determines the determinable interest does not occur within the perpetuity period, the provision shall be treated as void for remoteness and the determinable interest becomes an absolute interest.

Specific non-charitable trusts

15. (1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person or persons shall be construed as a power to appoint the capital or the income, as the case may be, and, unless created for an illegal purpose or a purpose

contrary to public policy, is valid so long as and to the extent that it is exercised either by the original trustee or his successor, within the perpetuity period, notwithstanding that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of the perpetuity period; but in the case of such a trust that is expressed to be of perpetual duration, the court has a discretion to avoid the whole limitation if it is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the term of partial validity otherwise conferred by this section.

Idem

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within the perpetuity period, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons, or his or their successors, who would have been entitled to the property comprised in the trust if the trust had been held to have been invalid from the time of its creation are entitled to such unexpended income or capital.

Rule in Whitby vs. Mitchell abolished

16. The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities.

Rules as to perpetuities not applicable to employee benefit trusts

17. The rules of law and statutory enactments relating to perpetuities do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits to employees or to their widows, dependants or other beneficiaries. R.S.O. 1960, c. 66, s. 64, amended.

Application of Act

18. Except as provided in subsection 2 of section 12, this Act applies only to instruments that take effect after this Act comes into force, and such instruments include an instrument made in the exercise of a general or special power of appointment after this Act comes into force even though the instrument creating the power took effect before this Act comes into force.

Short title

19. This Act may be cited as The Perpetuities Act, 1965.

Appendix B

An Act to amend The Accumulations Act

Enacting Formula

1. Subsection 1 of section 1 of The Accumulations Act is repealed and the following substituted therefor:

R.S.O. 1960 c. 4, s. 1 subs. 1 re-enacted

1. (1) No person shall dispose of any real or personal property so that the income thereof will be wholly or partially accumulated for any longer than,

Maximum accumution periods

(a) the life of the grantor;

(b) twenty-one years from the date of making an inter vivos disposition;

(c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the date of making an inter vivos disposition;

(d) twenty-one years from the death of the grantor, settlor or testator;

(e) the duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the death of the grantor, settlor or testator; or

(f) the duration of the minority or respective minorities of any person or persons who, under the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

Application of subs. 1 restrictions

(1a) The restrictions imposed by subsection 1 apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and such restrictions also apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated.

R.S.O. 1960 c. 4, amended

2. The Accumulations Act is amended by adding thereto the following section:

Rules as to accumulations not applicable to employee benefit trusts

3. The rules of law and statutory enactments relating to accumulations do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits to employees or to their widows, dependants or other beneficiaries. R.S.O. 1960, c. 66, s. 64, amended.

Short title

3. This Act may be cited as The Accumulations Amendment Act, 1965.

Appendix C

An Act to amend The Trustee Act

Enacting Formula

R. S. O. 1960 c. 408 amended

1. The Trustee Act is amended by adding thereto the following section:

Application of 1965 c. s. 7

64a. Where in the administration of any trust, estate or fund any question relating to the disposition, transmission or devolution of any property arises, including the right of any person to terminate a trust or an accumulation directed under a trust or other disposition, and it becomes relevant to inquire whether any person is or at a relevant date was or will be capable of procreating or giving birth to a child, section 7 of The Perpetuities Act, 1965 applies to any such question as it applies to questions concerning the rule against perpetuities.

Short title

2. This Act may be cited as The Trustee Amendment Act, 1965.

Appendix D

An Act to amend
The Conveyancing and Law of Property Act

Enacting Formula

R.S.O. 1960 c. 66 s. 64 repealed

1. Section 64 of The Conveyancing and Law of Property Act is repealed.

Short title

2. This Act may be cited as The Conveyancing and Law of Property Amendment Act, 1965.